

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

ERIC CARLSON

Claimant

V.

CITY OF TOPEKA

Self-Insured Respondent

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Docket No. 1,069,062

ORDER

Claimant requested review of the April 18, 2016, Award by Administrative Law Judge (ALJ) Rebecca Sanders. The Board heard oral argument on August 4, 2016.

APPEARANCES

James B. Biggs, of Topeka, Kansas, appeared for the claimant. Karl L. Wenger, of Kansas City, Kansas, appeared for self-insured respondent (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ was not persuaded that claimant's December 13, 2013, accident was the prevailing factor for claimant's current right knee condition and need for medical treatment, and denied claimant's request for compensation. The ALJ determined the incident was an aggravation of a preexisting condition and therefore, did not arise out of and in the course of claimant's employment with respondent.

Claimant appeals, arguing the ALJ's Award should be reversed and the Board find the December 13, 2013, lateral meniscus tear was a re-tear of the healed meniscus such that it is a physical change to the structure of the body, therefore entitling claimant to compensation. Claimant contends the Board should adopt the opinion of Dr. Prostic and find he is entitled to a 20 percent permanent partial functional impairment to the right lower extremity.

Respondent argues claimant failed to prove he suffered a lesion or change in the physical structure of his body arising out of his December 13, 2013, fall. Respondent also argues claimant's condition is due to, or is a natural and probable consequence of his preexisting condition, the accident was not the prevailing factor and claimant had only a temporary aggravation of his preexisting condition. Therefore, the ALJ's Award should be affirmed and claimant denied compensation.

The issues on appeal are:

1. Did claimant's personal injury on December 13, 2013, arise out of and in the course of his employment with respondent?
2. Was the December 13, 2013, accident the prevailing factor in claimant's need for medical treatment and the resulting disability or impairment?
3. What is the nature and extent of claimant's disability?
4. Is claimant entitled to future medical treatment?

FINDINGS OF FACT

Claimant began working for respondent in September 2012 as a police officer. The first six months of his employment were spent in the Police Academy. Claimant testified that in the Police Academy, classes are held for eight hours a day, five days a week. Some weeks the focus is on physical training and defensive driving. Claimant testified physical training included calisthenics, running, lifting weights, different drills and other activities.

Claimant acknowledged that in January 2013, he was having problems with his right knee. He described minor pain on the outside of his knee. Claimant indicated he was running when he began to have pain in his right knee. Claimant testified he reported this knee pain to his supervisor and went to St. Francis Medical Center and saw Dr. Mead. Claimant was placed on light duty for a week. It was claimant's understanding that he had a strain in his knee. He denied any swelling in his knee in January 2013. His pain level was a 3 out of 10 and gradually got better and he was able to return to regular duty in February 2013. Claimant finished training and graduated from the Police Academy. He was then sent into the field with Field Training Officers for two or three months and then released to work on his own. Claimant indicated he had no problems with his knee during this time. Claimant worked as a patrol officer until December 2013.

Claimant had a torn meniscus and repair in 2009. This injury occurred while claimant was running. He had no pain or problems after surgery and did not see a doctor again for knee problems until January 2013. Claimant's attorney acknowledged claimant had ongoing subluxation issues after 2009.

On December 13, 2013, claimant was participating in additional training when, while running on uneven ground, he fell to the ground after feeling his right knee pop. He felt immediate pain in his knee and it began to swell. Claimant reported this incident to his supervisor and went to St. Francis Medical Center.

Claimant again met with Dr. Mead and was referred to board certified orthopedic surgeon, Michael J. Schmidt, M.D., at Tallgrass Orthopedics and Sports Medicine. The history provided to Dr. Schmidt's office indicated claimant had undergone surgery four years before to repair a torn meniscus. Prior to this accident, claimant would experience a feeling like his knee would slip out of place when he was running or walking. However, this time, his knee felt like it had exploded and claimant was having trouble walking. Claimant was forced to use a crutch to get around. Claimant had an MRI that revealed a torn meniscus. Claimant indicated that after the December 13, 2013, accident he was unable to engage in any of the physical activities required of a police officer.

On January 2, 2014, claimant met with Lindsey A. Winterscheidt, PA-C, the physician assistant for Dr. Schmidt. Claimant complained of right knee pain that was aggravated by walking. His pain level was an 8 on a scale of 1-10. PA Winterscheidt examined claimant and found him to have a sprain/strain/tear of the lateral meniscus. Claimant was instructed to continue with sedentary duty and patellofemoral rehab was recommended. The option of surgery was mentioned should claimant not improve. Dr. Schmidt testified claimant's lateral tear was not caused from the preexisting patella subluxation claimant had in his knee.

On January 16, 2014, claimant met with Dr. Schmidt, complaining of right knee pain. The pain was aggravated with stair climbing and kneeling. Claimant had mild improvement with physical therapy and it was recommended claimant continue with physical therapy.

On February 7, 2014, Dr. Schmidt wrote that the injury to the claimant's right knee on December 13, 2013, aggravated the preexisting condition in the knee, likely chronic patella subluxation syndrome.¹ Dr. Schmidt noted the recent MRI indicated changes in the lateral meniscus. However, he was uncertain whether those changes were acute or chronic or simply showing post-surgical changes. At the time this report was dictated, Dr. Schmidt was unaware of the type of surgery claimant had in 2009 to his lateral meniscus.

On February 12, 2014, claimant met with PA Winterscheidt. Claimant showed improvement with physical therapy, but was showing signs of plateau. He continued to experience pain and discomfort in his knee daily. Claimant felt his pain was worse than it was prior to his first surgery. His pain level was a 5. It was again indicated claimant

¹ During the oral argument to the Board, claimant's counsel acknowledged the chronic patella subluxation syndrome did not arise out of his December 13, 2013, work-related accident.

might need surgery, and the plan was to consult Dr. Schmidt about a referral to Dr. Figuerres.

On February 27, 2014, claimant met with Leon W. Herring, PA-C, with right knee pain. PA Herring noted claimant's patella continued to slip out of place from a work injury. Conservative treatment had failed and his pain level was an 8. Claimant was examined and found to have a symptomatic sprain/strain/tear of his lateral meniscus. An arthroscopic meniscectomy, decompression and possible lateral release was recommended.

On October 23, 2015, Dr. Schmidt wrote the lateral meniscal tear was the direct result of the December 13, 2013, work injury and the prevailing factor that led to additional lateral compartment degenerative change. The doctor noted that, though the right knee x-rays on the day of injury showed some mild degenerative change, there had been no prior documentation of a lateral meniscal injury. He assigned an 11 percent impairment to the right lower extremity. This impairment was based on the *AMA Guides*, 4th Edition.²

On January 21, 2016, in direct response to a December 22, 2015, letter from respondent's attorney requesting clarification of his opinion, Dr. Schmidt wrote:

It is clear that Mr. Carlson had a long history of recurrent patella subluxation and, possibly, dislocation episodes prior to the work-related injury of 12/13/2013. Though Dr. Connolly made an attempt to address this problem surgically in 2009, I have no doubt that Mr. Carlson continued to have patella-femoral symptomatology and was prone to aggravation from time to time. In addition, Dr. Connolly also documented a lateral meniscus tear during that surgery which he made an attempt to repair. It is likely that Mr. Carlson had subsequent lateral compartment symptomatology possibly due to failure of meniscal healing, partial or complete re-tearing of the repair, or lateral compartment degenerative changes that often accompany significant lateral meniscus injury, whether repaired or resected.

It is my opinion, therefore, that the work related injury of 12/13/2013 temporarily aggravated the pre-existing conditions of chronic patellar subluxation and lateral meniscal injury and would, most likely, not have occurred in the absence of those pre-existing conditions. It is also my opinion that the 11% permanent partial disability rating to Mr. Carlson's right lower extremity is appropriate but is 100% attributable to the pre-existing conditions mentioned above.³

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are to the 4th edition unless otherwise noted.

³ Schmidt Depo., Ex. 2 at 3 (Dr. Schmidt's Jan. 21, 2016, letter).

Dr. Schmidt also testified:

Q. If he indicated that he didn't have any problem with regard to the popping and catching and clicking problems from 2009 until the December 13, 2013, incident, would that be indicative that he suffered a retear at that time?

A. If that were the case and he was asymptomatic in that interim, then, yes, I would put more emphasis on the more recent injury.

Q. A retear is structural change of the meniscus? Even though it's a tear of the repair it's still a structural change?

A. Yes.⁴

Due to the conflict in his opinion letters of February 7, 2014, and October 23, 2015, Dr. Schmidt was asked to clarify his opinion regarding causation. In his followup letter of January 21, 2016, he advised, based on the medical records of Dr. Connolly, the surgeon performing the repairs in 2009, there appeared to be a preexisting injury to the lateral meniscus for which an attempted repair was performed. Based upon his review of those 2009 medical records, Dr. Schmidt concluded the work injury of December 13, 2013, was a temporary aggravation of the preexisting conditions of chronic patellar subluxation and lateral meniscal injury and, most likely, would not have occurred in the absence of those preexisting conditions.

Dr. Schmidt noted claimant will continue to have knee pain because he doesn't have a lateral meniscus functioning at 100 percent. With the injury and previous surgery, claimant has had time to develop degenerative changes that have now developed into narrowing of the joint space which, in and of itself, will produce symptoms.

At the request of his attorney, claimant met with orthopedic surgeon Edward J. Prostic, M.D., for examination on April 28, 2014. Claimant had complaints of intermittent pain anteromedially about the right knee. His pain was worse with repetitious activities. He reported occasional swelling, clicking, popping and give way in his knee. Dr. Prostic examined claimant and found claimant sustained injury to his right knee in course of his employment on December 13, 2013. He noted claimant had a flap tear of the lateral meniscus along with moderate effusion and felt claimant would benefit from arthroscopic debridement. He opined the injury was independent of claimant's previous patellar difficulty and likely an extension of a tear that may have occurred during other duties as a patrolman.

At some point, Dr. Prostic was provided with medical records from 2009, when claimant had undergone the previous surgery, and from Dr. Mead's examination on

⁴ *Id.* at 23.

December 16, 2013. The history indicated that earlier in the year claimant had problems and his patella had become progressively more unstable. At the time claimant was jogging, on December 13, 2013, he was wearing a neoprene brace for his instability.⁵

When Dr. Prostic met with claimant on August 31, 2015, claimant continued to have intermittent pain anteromedially about the right knee; occasional swelling, clicking, popping and give way in his knee. X-rays taken of the right knee showed genu varum (bowlegged) with joint space narrowing of the medial compartment and degeneration of the anterior compartment. He testified claimant had a meniscal tear that had not completely healed and a new injury probably to the same area, plus an additional area of the meniscus. His opinion of claimant's condition had not changed since the last visit and Dr. Prostic felt, should claimant settle his claim, medical should be left open as he will require additional surgery and eventually total knee replacement arthroplasty.

Dr. Prostic assigned claimant a 20 percent impairment of the right lower extremity, after finding joint space narrowing, some malalignment, significant effusion and a torn meniscus. He did not assign any restrictions. Ten percent of the rating stemmed from Table 41, page 78 of the AMA Guides for the torn meniscus, with no rating for the joint space narrowing. The other 10 percent stemmed from the malalignment. Under the combined values chart this would equate to 19 percent, with the additional 1 percent impairment from the degeneration of the anterior compartment. Dr. Prostic opined the December 13, 2013, work incident was the prevailing factor in the injury, the medical condition and need for medical treatment, and resulting disability or impairment.

Claimant's employment with respondent was terminated because he was on light duty at the end of his 18 months probation period. After claimant's employment was terminated, his request for knee surgery was denied. Claimant still has not undergone surgery. Claimant testified that his pain level currently is a 5 out of 10 and has been for over a year. At one point, claimant's pain reached a 10 out of 10. He admits it has gradually gotten better, but he continues to have pain in his right knee. Claimant testified his knee also catches and sometimes slips out of place.

Claimant is currently working full duty as a police officer in Wellsville, Kansas. He has held this position since September 2014. Claimant has had no other injuries since December 2013. He works out three to five times a week and does exercises that are easier on his knee. He also testified that walking an excess number of stairs or putting weight on his right leg more than his left causes him pain.

⁵ Prostic Depo. at 17-18.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2013 Supp. 44-501b(b)(c) states:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2013 Supp. 44-508(d) states:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2013 Supp. 44-508(f)(1)(2)(B) states:

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

...

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

K.S.A. 2013 Supp. 44-508(g) states:

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given

case, the administrative law judge shall consider all relevant evidence submitted by the parties.

It is undisputed claimant suffered an accident on December 13, 2013, while undergoing additional training for his job with respondent. The dispute raised by respondent centers around whether that accident led to an injury, *i.e.*, a lesion or change in the physical structure of claimant's right knee. The medical evidence identifies at least two separate conditions in claimant's right knee. The patella subluxation syndrome has been stipulated as not related to claimant's accident. The dispute centers on claimant's lateral meniscus and whether there has been additional damage to that area from the above-noted accident.

The medical opinions of Dr. Schmidt and Dr. Prostin conflict on the issue of causation and the extent of any new damage suffered by claimant. Dr. Schmidt ultimately determined claimant's accident led to no new damage to the meniscus. However, his opinion is somewhat suspect in that he originally opined he could not state with a degree of medical certainty whether the December 13, 2013, injury was from an incomplete healing from the 2009 lateral meniscus surgery, a re-tear of the meniscus after claimant healed from the 2009 accident or from overall degeneration of the meniscus.

Dr. Prostin determined claimant suffered a new and distinct injury to his lateral meniscus from the December 13, 2013, accident. Claimant's history leading to that accident indicates little problem with his knee. Claimant was able to complete what appeared to be rigorous training for the police department without significant limitation. It was only after suffering the sudden pain while running on uneven ground that claimant's condition in his right knee worsened to the point of him needing significant additional medical care.

The Board finds the medical evidence supports a finding claimant suffered a change in the physical structure of his right lateral meniscus on December 13, 2013. The prevailing factor for that structural change was the work-related accident of that date.

K.S.A. 2013 Supp. 44-510e(a)(2)(B) states:

(B) The extent of permanent partial general disability shall be the percentage of functional impairment the employee sustained on account of the injury as established by competent medical evidence and based on the fourth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein, until January 1, 2015, but for injuries occurring on and after January 1, 2015, based on the sixth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.

Dr. Schmidt assessed claimant an 11 percent functional impairment to the right lower extremity. Dr. Prostic determined claimant's impairment was 20 percent to the right lower extremity. Both are competent board certified orthopedic surgeons with significant experience with workers compensation litigation. Neither sufficiently persuades the Board of his position. As such, the Board finds claimant's functional impairment to fall somewhere between the medical opinions. It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.⁶ The Board finds claimant has suffered a 16 percent functional disability to his right lower extremity at the level of the knee from the accident on December 13, 2013.

K.S.A. 2013 Supp. 44-510h(e) states:

(e) It is presumed that the employer's obligation to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. The term "medical treatment" as used in this subsection (e) means only that treatment provided or prescribed by a licensed health care provider and shall not include home exercise programs or over-the-counter medications.

The opinion of Dr. Prostic persuades the Board that claimant will need additional medical treatment for his right lateral meniscus tear in the future. Claimant has overcome the presumption contained in the statute and is awarded future medical treatment, upon application to and approval by the workers compensation Director.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be reversed and claimant awarded a 16 percent functional impairment to the right lower extremity at the level of the knee. Claimant has satisfied his burden of proving he suffered personal injury by accident which arose out of and in the course of his employment with respondent on December 13, 2013, with the accident being

⁶ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

the prevailing factor causing the lateral meniscus injury, medical condition and resulting disability. Claimant is awarded future medical treatment for that meniscus tear, upon application to and approval by the Director.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca Sanders dated April 18, 2016, is reversed as above noted, and an award of compensation is hereby made in accordance with the above findings in favor of claimant and against respondent the City of Topeka, a qualified self-insured, for an accidental injury occurring on December 13, 2013, for a 16 percent functional impairment to his right lower extremity at the level of the knee.

Claimant is entitled to 32 weeks of permanent partial disability compensation at the weekly rate of \$587.00, for a total award of \$18,784.00, all of which is due and owing and ordered paid in one lump sum, minus amounts previously paid.

All reasonable, authorized and related medical expenses are ordered paid.

Future medical benefits are allowed upon proper application to and approval by the Director.

Fees necessary to defray the expenses of the administration of the Workers Compensation Act are hereby assessed against respondent to be paid as ordered in the Award of the ALJ. In all other regards, the Award of the ALJ is approved insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this _____ day of September, 2016.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James B. Biggs, Attorney for Claimant
jbiggs@cavlem.com
gbronson@cavlem.com

Karl L. Wenger, Attorney for Self-Insured Respondent
mvpkc@mvplaw.com
kwenger@mvplaw.com
cleary@mvplaw.com

Rebecca Sanders, Administrative Law Judge